

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT DEON CUNNINGHAM,

Defendant-Appellant.

UNPUBLISHED

March 10, 2005

No. 248741

Wayne Circuit Court

LC No. 02-013711-01

Before: Zahra, P.J., and Murphy and Cavanagh, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for assault with intent to do great bodily harm less than murder, MCL 750.84, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced as a fourth habitual offender, MCL 769.12, to 20 to 40 years' imprisonment for the assault conviction, 40 to 60 months' imprisonment for the felon-in-possession conviction, and 2 years' imprisonment, to be served consecutively, for the felony-firearm conviction. This case arises from the shooting of Steven Bunnell. We affirm.

Defendant first argues that the trial court erred with respect to sentencing, where the court failed to address defendant's arguments concerning offense variable three (OV-3), MCL 777.33, and OV-6, MCL 777.36, where the court failed to enunciate proper substantial and compelling reasons for the upward departure in regard to the conviction for assault with intent to do great bodily harm less than murder, and where the court sentenced defendant as if he had committed the crime of assault with intent to commit murder.

Although the transcript of the sentencing hearing is somewhat confusing regarding the scoring of the guidelines, the trial court ultimately agreed with the prosecutor that the minimum guidelines range was 34 to 134 months. Taking into consideration defendant's status as a fourth habitual offender, this range indicates a prior record variable (PRV) level of E and an OV level of V. See MCL 777.65 (class D crime grid) and MCL 777.21(3)(c) (enhancement of grid for habitual offenders); see also West, Michigan Criminal Law and Rules (2002 ed), p 1365 (class D offenses – habitual grid).

The prosecutor retreated from his position that OV-6 should be scored at 50 points, and the guidelines range of 34 to 134 months necessarily reflects that OV-6 was not scored at 50 points, but scored at 0 points, which is the score requested by defendant. With respect to OV-3,

the prosecutor argued for a score of 25 points as opposed to the 10 points scored by the probation department in the presentence investigation report (PSIR). Defendant argued below that 10 points was appropriate for OV-3.¹ The trial court did not directly address the scoring of OV-3, but because the court accepted the proper range as being 34 to 134 months, and because this range necessarily requires a score above 10 points on OV-3, the court implicitly accepted the prosecutor's argument that OV-3 should be scored at 25 points.²

Defendant fails to present any substantive argument on appeal regarding the reasons OV-3 should be scored at 10 points, nor was a substantive argument presented below. A party may not simply announce a position and assert error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). Accordingly, the issue is deemed waived. Regardless, the minor modification of the minimum sentencing range that would occur were we to accept defendant's position would not alter our ruling below regarding the sentencing departure.

We now turn our attention to the sentencing departure. Because defendant committed his crimes in 2002, the legislative sentencing guidelines apply to this case. MCL 769.34(2); *People v Solmonson*, 261 Mich App 657, 668; 683 NW2d 761 (2004). Under these guidelines, a trial court may only depart from the minimum sentence range if it has substantial and compelling reasons to do so, and states those reasons on the record. MCL 796.34(3); *Solmonson, supra* at 668. The substantial and compelling reason justifying a guidelines departure must be objective and verifiable, meaning that the facts to be considered by the court must be actions or occurrences that are external to the minds of the judge, the defendant, and others involved in making the decision and must be capable of being confirmed. *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). To be substantial and compelling, the reasons for departure must keenly or irresistibly attract this Court's attention and must be of considerable worth in deciding the length of a sentence. *People v Babcock*, 469 Mich 247, 257-258; 666 NW2d 231 (2003). The sentencing court may not base a departure on a factor already taken into account in determining the appropriate sentencing range, unless the court finds from the facts in the record that the factor has been given inadequate or disproportionate weight. MCL 769.34(3)(b); *Babcock, supra* at 258 n 12.

In reviewing a departure from the guidelines range, whether a particular factor exists is a factual determination subject to review for clear error. *Id.* at 264. Whether a factor is objective and verifiable is reviewed de novo as a matter of law. *Id.* Whether a factor constitutes a substantial and compelling reason for departure is reviewed for an abuse of discretion. *Id.* at

¹ Under OV-3, 25 points is scored where the victim suffers a life threatening or permanent incapacitating injury, and 10 points is scored for a bodily injury requiring medical treatment. MCL 777.33(1)(c) and (d).

² It is clear from the transcript that the trial court was going to sentence defendant to 20 to 40 years' imprisonment for the assault conviction regardless of any minimal discrepancy in the guidelines range. This would explain why the court did not particularly focus on how OV-3 was scored.

264-265. The amount of the departure is reviewed for an abuse of discretion. *Abramski, supra* at 74.

The trial court found that under the circumstances, there were substantial and compelling reasons to support the sentence.³ Some of the circumstances stated by the court were that defendant intended to kill the victim, that defendant was on probation, that defendant has continued to violate probation, that the victim came very close to losing his life, that defendant is dangerous and should not be returned to the streets, that the victim was not armed, that the victim was attempting to flee, that defendant followed the car and fired four times, that fortunately innocent persons were not killed, and that an innocent person could be killed in the future if defendant is returned to society.

While some of the factors cited by the trial court are not objective and verifiable, and thus cannot be considered as grounds to depart, others factors named by the court are indeed objective and verifiable. Further, we find no clear error in regard to the court's factual determination as to the existence of the objective and verifiable factors. Moreover, we cannot conclude that the court abused its discretion in finding that the pertinent factors were substantial and compelling as permitted by MCL 769.34(3). In *Babcock, supra* at 273, the Supreme Court stated:

If a trial court articulates multiple “substantial and compelling” reasons for a departure from the guidelines, and the Court of Appeals determines that some of the reasons are substantial and compelling and others are not, the panel must determine whether the trial court would have departed, and would have departed to the same degree, on the basis of the substantial and compelling reasons alone. MCL 769.34(3).

Our review of the sentencing transcript clearly indicates that the trial court was adamant and uncompromising, and would remain so, relative to its conclusion that imposition of a 20-year minimum sentence was warranted and proper. We are confident that the trial court would have departed, and would have departed to the same degree, on the basis of the legitimate substantial and compelling reasons cited by the court. We find no basis to vacate defendant's sentence for the assault conviction.

Defendant next argues that the felony information with respect to the habitual offender notice was defective because it misidentified one of defendant's prior felony convictions and because one of the listed felony convictions was erroneous in that it never occurred. Defendant bootstraps the argument with a claim of ineffective assistance of counsel in light of the fact that

³ While the court stated that there were substantial and compelling reasons to sentence defendant as a fourth habitual offender, it is clear from the context of the court's discussion and the use of the terms “substantial” and “compelling” that the court misspoke and intended to rule that there were substantial and compelling reasons for departure.

no objection was made to the allegedly defective information and to defendant's sentence enhancement as a fourth habitual offender.⁴

While the information references a 2002 conviction for delivery of a controlled substance, the PSIR indicates that defendant actually pled guilty in 2002 to attempted possession with intent to deliver a controlled substance. Regardless of this minor discrepancy, defendant presents no argument that he did not have a felony drug conviction in 2002. The discrepancy does not change the fact that defendant is indeed a fourth habitual offender and was properly sentenced as a fourth habitual offender. See *People v Hornsby*, 251 Mich App 462, 470-471; 650 NW2d 700 (2002). Additionally, contrary to defendant's assertion that he did not have a felony conviction in 1997, which claim is not backed up with supporting documentation, the PSIR shows a 1997 felony drug conviction. The existence of a prior conviction may be established by information contained in the PSIR. MCL 769.13(5)(c). There was no plain error affecting defendant's substantial rights, *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999), and counsel's performance was not deficient, nor did defendant suffer prejudice, *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

⁴ Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law that are reviewed, respectively, for clear error and de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). In *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), our Supreme Court, addressing the basic principles involving a claim of ineffective assistance of counsel, stated:

To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." *Strickland*, *supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* at 690. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Defendant next argues that the trial court erred with regard to the court's instructions to the jury relative to reasonable doubt, which represented a diversion from the standard instruction.

We have reviewed the challenged instructions on reasonable doubt, and while some but not all of the challenged language used by the court is problematic, the court also appropriately referenced some of the language and principles found in the standard instruction, CJI2d 3.2, and clearly and properly instructed the jury regarding the prosecution's heavy burden of proof, the presumption of innocence, and the concept that defendant did not have to prove anything. See *Victor v Nebraska*, 511 US 1, 6, 10-17; 114 S Ct 1239; 127 L Ed 2d 583 (1994); *People v Bowman*, 254 Mich App 142, 149-151; 656 NW2d 835 (2002); *People v Hubbard (After Remand)*, 217 Mich App 459, 487-488; 552 NW2d 493 (1996). Viewing the reasonable doubt instructions in context, we conclude that there is not a reasonable likelihood that the jury applied the instructions in a manner that lowered the government's burden of proof. *Victor*, *supra* at 6.

Defendant next argues that counsel was ineffective for failing to request an alibi instruction. The trial court did not give an instruction on alibi. However, the court need only instruct on those theories that are supported by the evidence. *People v Fennell*, 260 Mich App 261, 265; 677 NW2d 66 (2004). Here, defendant's alleged alibi witness, Teresa Barnes, could not account for defendant's whereabouts at the time of the shooting. Given Barnes' testimony, an alibi instruction was not supported by the evidence, and defense counsel cannot be faulted for not seeking one. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Moreover, a review of defense counsel's closing argument reveals a strategy that focused on challenging the victim's version of events and his initial failure to identify defendant as the shooter, despite evidence that the victim and defendant were longtime acquaintances. Choosing this strategy instead of focusing on an alibi defense and Barnes, which was weak at best, did not constitute a deficient performance, and defendant fails to overcome the strong presumption that counsel's decision not to seek an alibi instruction was a matter of sound trial strategy. *Carbin*, *supra* at 599-600.

Defendant finally argues that he was denied his right to a fair trial when the court failed to instruct the jury on all of the elements of felon-in-possession. Defendant maintains that the trial court only instructed the jury on two of the three elements of the crime, failing to instruct on the ineligibility requirement. Furthermore, according to defendant, the trial court failed to instruct the jury that it had to find each of the elements beyond a reasonable doubt.

By affirmatively indicating satisfaction with the jury instructions, defendant waived appellate review of this issue. *People v Matuszak*, 263 Mich App 42, 57; 687 NW2d 342 (2004). Regardless, defendant's argument lacks merit.

The elements of felon-in-possession are (1) that the defendant was convicted of a felony, (2) that the defendant possessed a firearm, and (3) that at the time of possession less than three or five years, depending on the underlying felony, had passed since the defendant had completed his term of incarceration, satisfied all conditions of probation and parole, and paid all fines. MCL 750.224f. The trial court instructed the jury as follows:

Now, in Count 2 he is charged with Possession of a Firearm by a Felon. The elements would be that he had previously been convicted of a felony and that he was in possession of a firearm.

So, you may find he is guilty of a Felon in Possession of a firearm or not guilty.

Earlier in the trial, however, defendant stipulated in front of the jury that “defendant has a prior felony and would be ineligible to carry a weapon.” The statement that defendant “would be ineligible to carry a weapon” reflects an agreement that defendant was still within the relevant time period within which he could not carry a weapon. Additionally, the trial court’s “reasonable doubt” instructions were sufficient to protect defendant’s rights in regard to the offense of felon-in-possession. Reversal is unwarranted.

Affirmed.

/s/ Brian K. Zahra

/s/ William B. Murphy

/s/ Mark J. Cavanagh